

U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 02Mar2001

Case No.: 2000-LHC-310

OWCP No.: 07-147150

In the Matter of:

GEORGE CHAISSON,
Claimant

against

NORTH AMERICAN FABRICATORS, L.L.C.,
Employer

and

**SIGNAL MUTUAL INDEMNITY
ASSOCIATION, LTD.,**
Carrier

APPEARANCES:

ARTHUR BREWSTER, ESQ.,
On behalf of the Claimant

MAURICE BOSTICK, ESQ.,
On behalf of the Employer

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Worker's Compensation Act (hereinafter "the Act"), 33 U.S.C. § 901, et seq., brought by George Chaisson ("Claimant") against North

American Fabricators, L.L.C. ("Employer") for injuries allegedly sustained during the construction of a vessel.

The issues raised here could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held November 15, 2000 at Metairie, Louisiana.

STIPULATIONS

Prior to the hearing, the parties agreed to a joint stipulation (JX-1):¹

1. Claimant was engaged in shipbuilding/repair at the time of his accident;
2. Claimant was injured in an accident on January 9, 1998;
3. The injury occurred in the course and scope of the Claimant's Employment;
4. An employer/employee relationship existed between the Claimant and Respondent at the time of the accident;
5. Employer was timely advised of the accident and timely filed a notice of controversion;
6. Maximum medical improvement was originally reached on March 4, 1999 but is currently disputed because of need for second surgery;

ISSUES

The parties listed the following issues as disputed on the joint stipulation:

1. Whether the Claimant was temporarily totally disabled as a result of the work related accident;
2. To what extent the Claimant was permanently disabled;
3. The Claimant's actual date of maximum medical improvement;

¹ The following references will be used: TX for the official hearing transcript; JX-__ for Joint exhibits; CX-__ for the Claimant's exhibits; and RX-__ for Employer's exhibits.

The parties also listed the following specific issues as unresolved:

1. The Average Weekly Wage and compensation rate;
2. The Nature and Extent and Causation of Claimant's disability;
3. Claimant's earning capacity and entitlement to compensation based on a loss of wage earning capacity;
4. Attorney's fees and interest;
5. Contribution of the subsequent motor vehicle accident;
6. Suitable alternate employment;
7. Claimant's entitlement to medical treatment including surgery;
8. Whether Claimant is currently temporarily and totally disabled.

SUMMARY OF FACTS

I. Claimant's Employment

The Claimant, George Chaisson, worked as a first class welder for the Employer, North American Fabricators, LLC. (TX, p. 24). Prior to starting with North American, the Claimant had also worked as a welder and tacker and welder's helper for Maine Iron Works. (TX, p. 23). Claimant testified that his jobs with both companies were essentially the same and that he moved from Maine Iron Works to North American because the opportunity at North American was better for him. (TX, p. 23-4).

On the afternoon of January 9, 1998 the Claimant was working at Employer's shipyard when he sustained an injury. (TX, p. 24-5). Claimant testified that when the injury happened he was in a basket hoisted by a crane. According to the Claimant's testimony he was about 70 feet in the air at the time and was working on the smokestack of a ship. He noticed that the welding lead he was using had become tangled in the slip where the supply boat was. He went to move the lead by whipping it. While he was freeing his lead, the crane operator moved the crane and the Claimant felt his back begin to hurt. (TX, p. 25).

The Claimant testified that he reported the accident immediately to his leaderman, Mr. Theriot who said that he could go home for the rest of the day if he needed to. Claimant tried to finish working that afternoon. Over the course of the day, however, the Claimant's back pain slowly increased. (TX, p. 25-

6).

The next day, the Claimant went back to work and told the welding superintendent, a leaderman, and Mr. Theriot about his accident. He did not fill out an accident report. He did return to the work that he had been doing the day before. (TX, p. 26). He testified that he was able to continue working at that time. (TX, p. 27).

It was not until the following week that the Claimant sought medical attention. At that time, he went to see the yard's medic and advised them that he was having trouble with his leg. The medic massaged his leg and sent him back to work. Another week passed before the Claimant was referred by the medics to Dr. Davis. (TX, p. 27). Doctor Davis gave the Claimant a shot which alleviated the pain temporarily. The Claimant was then able to return to working light duty at the shipyard. (TX, p. 28).

Shortly thereafter, the Claimant saw Dr. Sweeney, an orthopedic surgeon at the same clinic as Dr. Davis. According to the Claimant, Sweeney told him that he had herniated a disk in his back. Doctor Sweeney removed the Claimant from work and instructed the Claimant not to work heavy duty without further treatment. (TX, pp. 29-30). Claimant then selected Dr. Landry as his choice of physician and saw him on the 23rd of January. (TX, p. 30). Dr. Landry immediately put the Claimant off of work, told him that he had herniated a disk and recommended surgery. (TX, p. 30).

Prior to the Claimant's surgery, Dr. Landry retired. The Claimant's case was taken over by Dr. Kinnard, who ultimately performed the surgery. (TX, p. 31). Prior to surgery the Claimant testified that he suffered from numbness in his left leg, lower back pain, and difficulty in walking. (TX, pp. 31-32). Following surgery at Terrebonne General Hospital the Claimant was released from the hospital and underwent physical therapy. He testified that he continued to have trouble with his left leg and that after three or four months of physical therapy Dr. Kinnard performed a functional capacity evaluation of the Claimant. (TX, p. 33).

II. Medical Evidence

Drs. Kinnard and Landry

The medical records of the Claimant's treatment from this injury are offered in various parts in the Employer's Exhibits. The initial notes that we consider are those of the Claimant's treating orthopedist, Dr. Landry. We note, of course, that when Dr. Landry retired, he was replaced for purposes of this case with Dr. Kinnard. The notes of both doctors are presented as EX-4.

Doctor Landry first examined the Claimant on January 23, 1998, approximately two weeks after his accident. Upon examination, Dr. Landry opined that the Claimant was suffering from marked sciatica with marked muscle spasm. Landry ordered an immediate MRI and discovered that the Claimant was suffering from a bulging disc. (EX-4, p. 87). Based on this evaluation, Claimant was scheduled for an epidural steroid injection and was advised not to work and to take bed rest whenever possible. He was prescribed Flexeril and Percodan for the pain. (EX-4, p. 88).

The epidural steroid injection was given to the Claimant on January 26, 1998. (EX-4, p. 89). The medical notes reflect that this treatment only partially relieved the Claimant's pain and symptoms. Accordingly the Claimant was given a second epidural steroid injection. (EX-4, p. 91). When the

second epidural injection was also not successful, the Claimant was scheduled for surgery with Dr. Kinnard.² (EX-4, p.93). The Claimant was admitted to Terrebonne General Medical Center on April 14, 1998 for a laminectomy, discectomy, and possible fusion of the discs at the L-4 and L-5 levels. (EX-4, p. 94). Doctor Kinnard's notes from the surgery indicate that the Claimant tolerated the procedure well and that there were no complications with it. (EX-4, p. 96).

Claimant was released from the hospital on April 18 with a prescription for Percocet and Valium. He was instructed as to the appropriate amount of physical activity and scheduled for a follow-up appointment in 10 days. (EX-4, p. 98). At the follow-up visit on April 30, 1998, Dr. Kinnard noted that the Claimant was "quite adamant about receiving foot inserts and a mattress pad." The doctor did not feel that these items were necessary, but because of the Claimant's disposition, he provided a prescription for them. Other than this situation, Dr. Kinnard indicates that the Claimant was doing well. According to his office note he explained to the Claimant the amount of time required for recovery from this injury. (EX-4, p. 99).

When Dr. Kinnard spoke with the claimant and his wife by phone on May 14, 1998, they were again insistent that the Claimant needed magnetic foot inserts. According to Kinnard's notes, Claimant and his wife appeared upset that the doctor would not prescribe these inserts. Dr. Kinnard's notes explain that there is no scientific evidence that the inserts will benefit the Claimant and, given the cost, he does not see a reason to prescribe them. (EX-4, p. 99). By May 21, 1998 Dr. Kinnard reports that the Claimant was walking up to 1 mile per day. He also reports that the Claimant was having some trouble sleeping. Doctor Kinnard indicates that the Claimant was doing well based on these complaints and that with time the sleeping problems should improve. (EX-4, pp. 99-100).

²It appears from the medical records and the testimony as though Dr. Landry retired or took a leave of absence from the practice of medicine between his February 3, 1998 visit with the Claimant and March 18, 1998 when Dr. Landry saw the Claimant to schedule him for surgery.

Doctor Kinnard's notes from June 18, 1998 indicate that the Claimant was now walking every other day and that he was still experiencing some pain and symptoms in his left leg. Kinnard told the Claimant that this possible neurological impairment was why he had performed surgery and that with time the symptoms should hopefully improve. Kinnard instructed the Claimant to return in 1 month at which time Kinnard thought he might consider physical therapy. (EX-4, p. 100). In July of 1998 Dr. Kinnard started the Claimant on a physical therapy program. The Claimant was still complaining of muscle spasms in his left leg, but Dr. Kinnard felt that he was making substantial progress. (EX-4, p. 101).

Claimant's condition continued to improve until September of 1998. In that month, he reported to Dr. Kinnard that he had a flare of pain in his lower back and severe cramping in his left leg. Kinnard treated this situation with Vicodin and Soma. He felt that it was conceivable that Claimant could return to work within the next month. (EX-4, p. 102). The Claimant's condition continued more or less unchanged according to the medical notes through January of 1999. (EX-4, pp. 103-105).

In January of 1999, Dr. Kinnard scheduled the Claimant for an FCE. (EX-4, p. 105). In March of 1999, following the FCE, Dr. Kinnard indicated by letter to Employer that the Claimant would not be able to return to his former employment and would require some form of retraining.³ (EX-4, p. 107). In June of 1999, Dr. Kinnard wrote another letter indicating that he did not feel the Claimant was capable of performing a proposed job as a route sales driver for Schwan's. (EX-4, p. 108). The Claimant apparently took another job, which he was working at in September of 1999 when he saw Dr. Kinnard in follow-up. Kinnard's notes from that visit indicate that the Claimant was still having spasms in the left leg and that he was working beyond his restrictions. (EX-4, p. 109). Eight days later, on September 8, 1999, Claimant told Dr. Kinnard that he did not think he could keep working. He indicated a bad reaction to the drug Elavil, and told the doctor that his lower back felt tired and that he could not tolerate the pain in his left leg. (EX-4, p. 110). In response, Kinnard changed the Claimant's medications. (EX-4, p. 110). This continued through September 30, 1999, when Dr. Kinnard told the Claimant that he should seek a neurosurgical evaluation to look for other treatment options. (EX-4, p. 111).

On July 27, 2000 the Claimant saw Dr. Kinnard and indicated that he was working at Houma Central Pharmacy. He told the doctor that he thought the work was causing his increased pain. Dr. Kinnard disagreed and stated that as long as the Claimant stayed within his restrictions there should not be further problems. (EX-4, p. 112). On September 8, 2000, Claimant returned to Dr. Kinnard and complained of substantially increased pain in his lower back with referral to the leg. Doctor Kinnard feared

³Dr. Kinnard testified at his deposition that the results of the FCE indicated that Claimant should be restricted to standing or walking for two to four hours at a time for a total of six to eight hours per day, could sit up for two hours and drive for up to two hours. The Claimant was also restricted to lifting no more than 20 pounds on a frequent basis and 50 pounds infrequently. The Claimant could also bend, squat, kneel, climb, twist, rotate, and crawl occasionally. (EX-10, p. 12).

that the Claimant might have re-herniated his disc, causing increased symptoms, and ordered an MRI. (EX-4, p. 113). The medical records do not indicate the results of this MRI. Doctor Kinnard, however, testified at his deposition that based on his examination of the Claimant he believed that the Claimant had re-injured his back. (CX-6, p. 6). Kinnard opined that this injury was related to the Claimant's original work-place injury. (CX-6, pp. 29-30). According to Dr. Kinnard, the Claimant is incapable of performing any work without additional surgery. Kinnard has taken the Claimant off work as of September 8, 2000. (CX-6, pp. 17, 27, 28).

Dr. Sweeney

The Claimant also visited Dr. Sweeney for second opinions and independent medical examinations with respect to his injury. The medical records prepared by Dr. Sweeney are presented to the Court as EX-3.

On February 12, 1998, Claimant saw Dr. Sweeney for a second opinion. By this point, the Claimant had received two steroid injections without significant improvement. Based on his examination, Sweeney indicated that it was increasingly likely that the Claimant would require a laminectomy. Because the Claimant's complaints were no worse than on his initial visit, however, Dr. Sweeney opined that the Claimant could wait for a short period prior to having the surgery. (EX-3, p. 9).

Doctor Sweeney also performed an IME of the Claimant in November of 1999. Sweeney's examination of the Claimant, his review of the medical records, and his knowledge of the case from prior visits with the Claimant contributed to his opinion. He states in his opinion letter that the Claimant has a full range of motion in his lumbar spine and that one calf is smaller than the other. Apparently the Claimant was very defensive when asked about his car accident and the injuries related to it. Doctor Sweeney felt that this was a significant additional injury and that based on the medical evaluations and data the Claimant was at Maximum Medical Improvement from his injury. (EX-3, pp. 5-6).⁴

III. Automobile Accident

Nature of Accident

During his treatment for his work related injury the Claimant was involved in a car accident. The accident occurred April 19, 1999, after the time at which Claimant would have reached maximum medical improvement according to his treating physician. The police record of the accident is provided for the Court at EX-2.

⁴In Comparison, we note that the Claimant's treating physician, Dr. Kinnard, indicated that he would have reached MMI in February of 1999, approximately 1 year after his surgery. (EX-4, p. 105).

According to the accident report, the crash occurred on US Highway 90 in Houma, Louisiana on April 19, 1999 about 12:35 p.m. (EX-2, p. 1). The accident happened when the Claimant, who was driving along Highway 90, ran a red light and was struck by a police vehicle traveling through the green light on a cross street. (EX-2). Claimant suffered some injuries and was transported to Terrebonne General Hospital by the Acadian Ambulance Service. (EX-2, p. 2).

Injuries

Following the car accident Claimant saw Dr. Bartholomew for treatment. According to Dr. Bartholomew's notes, the Claimant suffered a head injury and cuts and bruises as a result of the accident. (EX-8, p. 5). Several days after the accident, Claimant was complaining of neck and back pain. Dr. Bartholomew notes that he does not know if the Claimant aggravated his prior condition or if these are independent complaints. (EX-8, p. 5). The office notes from his first visit with Dr. Bartholomew indicate that the Claimant complained primarily of neck pain with some additional lower back pain. (EX-8, p. 7). The doctor ordered an MRI of the Claimant's cervical spine as a

diagnostic device. (EX-8, p. 7). The results of the MRI indicated that there was a 1 mm bulge at the C5-6 and C6-7 levels of the spine. There was no associated stenosis or encroachment and the MRI was otherwise normal. (EX-8, p. 9).

When Dr. Bartholomew saw the Claimant in follow-up on June 9, 1999, he examined the Claimant and reviewed the results of the MRI. Based on this evaluation, Dr. Bartholomew diagnosed the Claimant with a lumbar strain and a resolved cervical strain. The doctor also recommended a three week course of physical therapy for the Claimant. The doctor also indicated in his notes that the Claimant had asked him about magnetic therapy but that he did not know enough about it and that he knew of no scientific evidence that it worked. (EX-8, p. 10).

On August 6, 1999 the Claimant saw Dr. Bartholomew again. At this time the doctor's physical examination revealed that the Claimant had some low back pulling when he bent down and that there was some sensory decrease in the left great toe. With those exceptions, however, Bartholomew indicated that the Claimant was in sufficient health to return to work with the restrictions presented by the FCE performed in conjunction with treatment of his work-related injury. Dr. Bartholomew therefore released the Claimant from further regularly scheduled treatment. (EX-8, p. 11).

The Claimant visited Dr. Bartholomew for the final time on March 9, 2000. At that time he told the doctor that returning to work had caused some increase in his lower back pain. He stated, however, that the changes he was experiencing were related to his previous work place accident and not to the motor vehicle collision. (EX-8, p. 12). No further information is provided by Dr. Bartholomew.

During his deposition, Dr. Kinnard was asked about the effect of the auto accident on the

Claimant's work-related injury. Kinnard testified that, based on what the Claimant had reported to the Terrebonne General Emergency Room and Dr. Bartholomew, the auto accident had not likely aggravated Claimant's prior condition. As he explained, following the auto accident, Claimant's symptoms resolved and showed no marked increase with conservative treatment. Additionally, Dr. Kinnard noted that the Claimant reported right side lumbar pain and injuries following the car accident. After his work-place accident, the Claimant's complaints were of left side lumbar pain and left leg referral. (EX-10, p. 26).

DISCUSSION

I. Jurisdiction

The parties to this case do not contest the Court's jurisdiction. (JX-1). The Claimant was a welder at Employer's shipyard at the time of his injury. He worked either aboard ships in the water or in dry dock or in a building immediately adjacent to the water. The Court finds that the Claimant

was an employee within the meaning of Section 902 (3) of the Act. Finally we find that the Claimant was employed in a maritime location (a shipyard and dry dock) with respect to Section 903(a) of the Act. *See* 33 U.S.C. § 902, 903.

II. Claimant's Prima Facie Case

The parties to this matter also stipulate that the Claimant was injured, in the course and scope of his employment, on January 9, 1998. (JX-1). In order to make out a prima facie case and thereby invoke the Section 20 presumption, the Claimant must prove that he suffered some harm or pain. *See Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir 1979). The Claimant must also demonstrate that an accident occurred or working conditions existed which could have caused the pain or harm. *See Kelaita v. Triple A. Mach. Shop*, 13 BRBS 386 (1981).

In this case, we find that the Claimant has met his burden and invoke the Section 20 presumption. Claimant demonstrates through testimony and evidence that he was injured on the job on January 9, 1998. The medical evidence reflects that the Claimant sought medical treatment for a back injury within a few days of the accident. By the following week, the Claimant had been referred to Dr. Davis for further medical treatment for his injury. (TX, p. 27). Subsequently, Drs. Landry and Kinnard who jointly served as the Claimant's treating physician, recommended, and Dr. Kinnard performed a laminectomy and discectomy on two discs in the Claimant's spine. (TX, pp. 30-31). Prior to his surgery the claimant testified that he suffered from numbness in his left leg, lower back pain, and difficulty walking. (TX, pp. 31-32). The evidence shows that it took Claimant almost a year from the date of his surgery to reach

maximum medical improvement. (EX-4, p. 105).

Based on the medical evidence and the Claimant's testimony the Court finds that the Claimant has made a showing sufficient to meet the first requirement of the prima facie case. There is no doubt that he suffered harm to his back. A great deal of pain was almost certainly attendant to this harm.

The second requirement is that Claimant show that working conditions existed or an accident occurred that could have caused this harm or pain. The Claimant testified that his symptoms appeared within one or two days after a particular accident. Specifically, Claimant explained that his pain set in after a crane that he was working from was abruptly jerked underneath him. (TX, p. 25).

The Court finds that this is sufficient evidence to support the conclusion that a workplace accident occurred which caused the Claimant's harm or pain. Based on these two findings, the Court invokes the Section 20 presumption in favor of the Claimant. 33 U.S.C. § 920(a).

Once the Claimant has met his burden and the presumption is invoked, it is Employer's burden to go forward with substantial evidence that the injury did not arise out of the Claimant's employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082, 4 BRBS 466, 475, (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Most often this evidence is presented in the form of independent medical examiners who offer reasons to disbelieve the causal connection between the Claimant's injuries and his occupation.

In this case, the Employer does not offer medical opinions rejecting the notion that Claimant's injuries were caused by working conditions or a work related accident. Instead, Employer relies on the assertion that Claimant's subsequent car accident has caused his continuing medical complaints in order to avoid paying compensation. Employer's only independent medical opinion, that of Dr. Sweeney, supports the conclusions, diagnosis, and treatment steps taken by Drs. Landry and Kinnard in treating the Claimant's workplace injury. It does not deny that the injury was work related.

In his initial second opinion, Dr. Sweeney opined that it was increasingly likely that the Claimant would require a laminectomy. He stated that the Claimant could wait for a short period before having the procedure, but apparently agreed that it would soon be necessary. (EX-3, p. 9). Later, his independent medical opinion indicates that the Claimant was aided significantly by the surgery. (EX-3, pp. 5-6). Sweeney stated in his independent medical evaluation that he felt the Claimant had reached maximum medical improvement by the date of the evaluation, November of 1999. He did not give a more precise date for that condition. Sweeney also stated that he thought that the intervening car accident was significant as an additional injury, but was unable to elicit sufficient information about the accident to determine more than that the Claimant had been injured and sought medical treatment. (EX-3, pp. 5-6). Based on this evidence, the Court finds that the Employer has not successfully rebutted the Section 20 presumption. We conclude that the Claimant's injury is compensable under the act.

III. The Auto Accident

Employer's primary defense to this claim is that the auto accident Claimant was involved in on April 19, 1999 was primarily responsible for his inability to work. Employer goes to great lengths to assert that the auto accident aggravated Claimant's condition as evidenced by the records and testimony of various physicians. Employer does not, however, explain how this aggravation would reduce the Claimant's entitlement to compensation.

Claimant, in contrast makes two assertions. First, Claimant argues, and the Court finds that the evidence supports the conclusion, that the auto accident did not affect his prior injury. Doctor Bartholomew's notes show that the Claimant had some additional lower back pain when he returned to work in March of 2000. Bartholomew further indicates that Claimant's additional lower back pain was related to his work-place accident, and not to his auto accident. (EX-8, p. 12). In addition, Dr. Kinnard's deposition testimony explains why the auto accident is not likely to have aggravated the Claimant's prior condition. Kinnard explains that the Claimant reported right side lumbar pain after the accident and left side pain after his work-place injury. Kinnard also notes that because the Claimant did not experience a net increase in symptoms after the car accident, there was no medical evidence to support the aggravation theory. (EX-10, p. 26).

Second, Claimant argues in his post-trial brief that the auto accident is legally insufficient to rebut the Section 20 presumption. The Court agrees. We must construe the Act liberally in favor of the injured Claimant. *See Voorhis v. Eikel*, 345 U.S. 328 (1953). Once the Claimant has made his prima facie case, the Employer may rebut the presumption with evidence of a supervening cause only if that cause overpowers and nullifies the original injury. *See Vorhis v. TEIA*, 190 F.2d 929 (5th Cir. 1951), *cited with approval in Shell Offshore v. Director, OWCP*, 122 F.3d 312 (5th Cir. 1997). In order to avoid liability, the Employer must show that the disability resulting after the supervening cause is not the natural progression of the original injury. Without medical testimony apportioning disability, the Employer is responsible for all of it. *See Plapper v. Marine Corps Exchange*, 31 BRBS 109 (en banc), *aff'g* 31 BRBS 13 (1997).

Although the Employer lists Dr. Sweeney's deposition as EX-8, that exhibit is not included in the package submitted at trial. The deposition testimony of the other doctors offered by Employer does not allocate the disability between the car accident and the work-related injury. Doctor Kinnard, as we noted previously, states that the Claimant's condition was not likely aggravated by the car accident. (EX-10, 26). Similarly, Dr. Bartholomew testified that any lumbar strain suffered as a result of the car accident did not result in permanent aggravation or change in the existing lumbar condition. According to Bartholomew, the additional injuries caused by the auto accident all resolved for the most part, leaving only the residual effects of the original injury and surgery. (EX-11, p. 13).

The Court finds that there is no medical testimony apportioning disability. We therefore follow the Board's decision in *Plapper*, and find that the Employer is liable for all of the Claimant's disability.

IV. Nature and Extent of Disability

Temporary Total Disability

As a result of his injury, the Claimant was unable to work at his regular position. He was originally removed from work by Dr. Sweeney approximately two weeks after his accident pending further treatment. (TX, pp. 29-30). Subsequently, he saw his chosen physician, Dr. Landry on January 23, 1998. Landry ordered the Claimant off work as of that date and advised him that he needed surgery for his back injury. (TX, p. 30). The Claimant had the surgery and made good progress through his recovery although he was unable to work during the recovery period. In January of 1999, the Claimant's FCE indicated to Dr. Kinnard that the Claimant would not be able to return to his previous employment. (EX-4, p. 107). Sometime after June of 1999, Claimant apparently took another job, working as a delivery driver. (EX-4, p. 109). He worked at this position for some time, but in September of 1999 told Dr. Kinnard that he did not think he could keep working. (EX-4, p. 110).

The evidence presented by the Claimant indicates that he was unable to work as a direct result of his injury from January 23, 1998 until June 3, 1999. Based on this evidence, the Court finds that the Claimant was temporarily totally disabled during that period and entitled to compensation as such.

The evidence indicates that the Claimant now requires surgery for a recurrent disc herniation at the L4-5 level. (CX-6, p. 6). There is no question but that this is related to the original work injury. (CX-6, pp. 29-30). According to Dr. Kinnard, the Claimant is incapable of working in any capacity pending this surgery and is on a temporary totally disabled/no work status as of September 8, 2000. (CX-6, pp. 17, 27, 28). It is obvious, based on this evidence that the Claimant is therefore also temporarily totally disabled from September 8, 2000 until he recovers from the additional surgery and can return to work. As such, the Court cannot at this time set a date of maximum medical improvement or determine permanent disability.

Permanent Disability

A temporary disability may become permanent under the Act where the Claimant demonstrates either 1) that he suffers from residual disability after the point of maximum medical improvement; or, 2) that his condition has continued for a lengthy period and apparently is of lasting or indefinite duration. *See James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

In this case, the parties stipulate that the Claimant reached Maximum Medical Improvement as of March 4, 1999, but that he now requires further treatment and therefore is again temporarily totally disabled. (JX-1). We find that the Claimant is entitled to disability compensation for permanent disability during the intervening period between June 3, 1999 and September 8, 2000.

The records presented by the Employer indicate that between August 30, 1999 and June 9, 2000, Claimant returned to work for the Employer. During this period he was put on a light duty job as a pipe welder in the employer's pipe shop. The records, however, indicate that the Claimant worked a full work week only infrequently during this time period. (EX-19). Immediately prior to his work injury, the Claimant was earning \$15.27 per hour working for Employer. (EX-26, p. 7). When he returned to work after his accident, Claimant earned \$14.60 per hour working for the Employer at a light duty pipe shop position. (Ex-26, p. 11).

From June of 2000 until September 2000 when he was again removed from work pending surgery, Claimant worked for the Houma Central Pharmacy as a courier. The records of this employer are presented as EX-29. According to the wage records presented from Houma Central pharmacy, the Claimant earned \$7.25 per hour while working for this employer. (EX-29, p. 21).

Claimant's wage records from his return to North American Fabricators and his work with Houma Central Pharmacy demonstrate a loss of wage earning capacity following his accident. Claimant is therefore entitled to an award of permanent partial disability for the period where he returned to work.

Prior to trial, the parties stipulated that the Claimant earned \$44,889.41 during the 52 weeks prior to his injury. (JX-1). Claimant urges that this amount should be converted into an average weekly wage by dividing by 49 weeks, the number of weeks actually worked during that period. Claimant explains his three week absence from work noting that he was attending a funeral in another

state. *See Claimant's Brief* at 39-40. Employer does not respond to this argument. The Court therefore accepts the stipulation with regard to the Claimant's earnings and divides that figure by the 49 weeks worked to arrive at an average weekly wage of \$916.11.

In order to determine the Claimant's loss of wage earning capacity we must compare the average weekly wage to the Claimant's wages after the injury. Claimant returned to work for Employer for 40 weeks beginning August 30, 1999. During this period he earned \$17,551.90. (EX-26, pp. 18, 30). We divide this amount by 40 weeks actually worked and determine that during this period the Claimant earned an average post-injury wage of \$438.79. When we subtract this amount from the pre-injury wage, we determine that the Claimant suffered a loss of earning capacity of \$477.32 per week for which he is entitled to compensation.

To this period, we add the time for which Claimant worked for Houma Central Pharmacy. Claimant worked for this employer for 11 weeks beginning June 5, 2000. (EX-29, pp. 15-20). During this period the Claimant earned a total of \$3,181.85. (EX-29, p. 26). We divide this figure by 11 weeks and arrive at an average weekly wage with Houma Central Pharmacy of \$289.26. Subtracting this figure from the Claimant's pre-injury average weekly wage results in a demonstrated loss of earning capacity of \$626.85 per week for which the Claimant is entitled to compensation.

Ordinarily, a decision finding permanent disability would consider whether the Employer had demonstrated the existence of suitable alternate employment. In this case, however, we must do things a bit differently. Because the Claimant requires in the Court's opinion further medical treatment for his original work-place injury, we cannot make a determination as to whether or not he is even able to return to work. We have decided that, pending further surgery, Claimant is temporarily totally disabled. Once that surgery is performed and the Claimant has had sufficient time to recover a further decision on his ability to perform work will be appropriate. Without knowing the results of the surgery, however, such a decision is impossible.

ORDER

1. The Claimant is entitled to all past and continuing medical treatment reasonably necessary to improving his medical condition. This specifically includes the second laminectomy/discectomy/fusion proposed by Dr. Kinnard to alleviate Claimant's ongoing medical problems;
2. Claimant is entitled to temporary total disability payments at the rate of \$610.74 from January 23, 1998 until June 3, 1999 and from September 8, 2000 until the present and continuing;
3. Claimant is entitled to permanent partial disability payments for the period from August 20, 1999 until June 9, 2000 at the rate of \$315.03 per week;
4. Claimant is entitled to permanent partial disability compensation for the period from June 9, 2000 until September 8, 2000 at the rate of \$413.72 per week;
5. Employer is entitled to credit for all compensation paid until the present date;
6. Employer shall pay Claimant interest on any accrued unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the last auction of 52 week United States Treasury Bills as of the date this Decision and Order is filed with the District Director;
7. Claimant's Counsel, Arthur Brewster, shall have 20 days from the receipt of this Order in which to file an attorney fee petition and simultaneously serve a copy of the petition on opposing counsel. Thereafter, Employer shall have 20 days from receipt of the fee petitions in which to respond to the petitions.

So ORDERED.

A

RICHARD D. MILLS

Administrative Law Judge

RDM/ct